IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LEONARD V. LOPES,	§	
	§	
Plaintiff,	§	
v.	§	Civil Action No. 3:00-CV-1053-L
	§	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Before the court are Defendant's Motion to Dismiss Pursuant to Rule 12(b)(6), filed May 23, 2000, and Defendant's Motion for Summary Judgment, filed December 29, 2000. After careful consideration of the motion, response, briefs, and applicable law, the court **grants** the Motion to Dismiss. Defendant's Motion for Summary Judgment is therefore **denied as moot**.

I. Factual and Procedural Background[1]

On the afternoon of October 26, 1999, Plaintiff Leonard Lopes ("Lopes") was riding a bicycle on Jim Miller Road in Dallas, Texas, when he was struck from behind and from the side by a car operated by Anita N. Miller ("Miller"). Miller admitted at the scene that the accident was due to her negligence and the report by the Dallas Police Department stated that she was at fault for failure to yield the right of way to Lopes. Miller had an automobile insurance policy with Defendant State Farm Mutual Automobile Insurance Company ("State Farm").

[1] In reviewing a motion to dismiss, the court relies only on the well-pleaded facts in the complaint and accepts those facts as true.

Lopes was seriously injured in the accident and was treated at the hospital and by private physicians, but continues to suffer the effects of the accident. He lacked medical insurance and the funds necessary to pay for continuing medical treatment and physical therapy prescribed by his physicians. Lopes requested that State Farm (within the limits of the policy) advance funds to pay medical expenses and for physical therapy on an interim basis, pending the final resolution of Lopes' claims for future medical expenses and the injury itself. State Farm has refused to do so.

Lopes filed suit against State Farm in state court on April 19, 2000. He asserts causes of action for violation of the Texas Insurance Code by "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear," Tex. Ins. Code Ann. art. 21.21, § 4(10)(a)(ii) (Vernon Supp. 2001); and for violation of the Texas Deceptive Trade Practices — Consumer Protection Act ("DTPA"), Tex. Bus. & Com. Code Ann. §§ 17.46(b), 17.50(b) (Vernon Supp. 2001). State Farm removed to this court on May 18, 2000 on the basis of diversity jurisdiction, pursuant to 28 U.S.C. §§ 1332, 1441(b). State Farm then filed the motion to dismiss on May 23, 2000. The motion to dismiss argues that Lopes has not stated a claim upon which relief can be granted because: 1) the Texas Insurance Code grants standing to sue for the alleged violation only to the insured and not to third parties such as Lopes; and 2) Lopes was not a "consumer" and thus had no standing to sue under the DTPA.

II. Standard of Review

A motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) "is viewed with disfavor and is rarely granted." *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir.1997). A district court cannot dismiss a complaint, or any part of it, for failure to state a claim upon which relief can be granted "unless it appears beyond doubt that the plaintiff can prove no set

of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir.1995). In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir.1996). In ruling on such a motion, the court cannot look beyond the pleadings. *Id.*; *Spivey v. Robertson,* 197 F.3d 772, 774 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 2659 (2000). The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid cause of action when it is viewed in the light most favorable to the plaintiff and with every doubt resolved in favor of the plaintiff. *Lowrey*, 117 F.3d at 247. A plaintiff, however, must plead specific facts, not mere conclusory allegations, to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir.1992).

III. Analysis

A. Texas Insurance Code Claim

Lopes asserts a claim pursuant to Tex. Ins. Code Ann. art. 21.21, § 4(10)(a)(ii) (Vernon Supp. 2001) for "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear." Such a cause of action, however, is not available "to a third party asserting one or more claims against an insured covered under a liability insurance policy." *Id.* § 4(10)(b). A third party claimant, such as an automobile accident victim, does not have "a direct cause of action against an insurer for unfair claim settlement practices." *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 147 (Tex. 1994); *see also Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 384 n.1 (Tex. 2000) (noting that art. 21.21, § 4 was amended in 1995 "to prohibit unfair settlement practices against insureds and beneficiaries" but also "codified the holding of *Watson* by providing that the amended clause did not create a direct cause

of action against an insurance carrier by third parties whose claims were based on the liability of insureds").

Lopes asserts that *Watson* is not dispositive here, because there are at least some exceptions to that rule. He cites *Palma v. Verex Assur., Inc.*, 79 F.3d 1453, 1457 (5th Cir. 1996), which predicted that the Texas Supreme Court would hold that "standing under art. 21.21 is satisfied by not only those who can establish privity of contract or reliance on a representation of the insurer, but also by those who can establish that they were an intended third-party beneficiary of the insurance contract." Lopes asserts that "he may be able to prove a set of facts that would bring him within the principles stated in *Verex* as an intended third party beneficiary of the contract of insurance," but does not indicate the facts or theories on which he would rely. Plaintiff's Response Brief at 2. *Palma* involved a mortgage insurance policy, and concluded that the mortgagor was an intended third party beneficiary of the mortgage insurance contract between the mortgagee and the insurer. *Palma*, 79 F.3d at 1458. It also apparently involved violations of the Insurance Code *other than* claim settlement practices. *Id.* at 1455. *Palma* is not this case, which is virtually identical to the situation in *Watson*.

To establish third party beneficiary status requires "(1) that [Lopes] was not privy to the written agreements between [Miller] and [State Farm]; (2) that the contract was made at least in part for [Lopes'] benefit; and (3) that the contracting parties intended for [Lopes] to benefit by their written agreements." *Id.* at 1457. That Lopes was injured by Miller and made a claim under the insurance policy cannot by itself make him an intended third party beneficiary. If that were the case, *all* third party claimants whose claims arose under the insurance policy would have standing and the holding in *Watson* would be meaningless. *Watson* noted that "for *purposes of recovering attorney's*

fees under an insurance contract, a third party *who has obtained a judgment* against an insured is an intended third party beneficiary of the insurance contract" but specifically denied such third party beneficiary status to an automobile accident victim suing for unfair claim settlement practices. *Watson*, 876 S.W.2d at 150 (emphasis added). Lopes has pleaded no facts that would support a determination that he was an intended third party beneficiary, and therefore *Watson* rather than *Palma* applies. The court concludes that the cause of action asserted under the Texas Insurance Code does not state a claim upon which relief can be granted.

Lopes also requests that, if the court determines that his complaint does not state a claim, he be allowed leave to amend his pleading. The court declines to grant leave at this time. Lopes' response brief identifies no facts which conceivably would support a finding that he was an intended third party beneficiary of the insurance contract between Miller and State Farm. If there are such facts, of course, Lopes may file a motion to reconsider. The court notes, however, that he would be required to plead specific facts, not mere conclusory allegations, to avoid dismissal. Accordingly, the court would not grant a motion to reconsider and for leave to file an amended complaint unless the motion: 1) indicates the specific facts he would plead in an amended complaint; and 2) shows that these facts could support a determination that he was an intended third party beneficiary of the insurance contract.

B. DTPA Claim

State Farm moves to dismiss Lopes' DTPA claim on the basis that Lopes is not a "consumer" and therefore has no standing to sue. The DTPA provides a cause of action for a "consumer." Tex. Bus. & Com. Code Ann. § 17.50 (Vernon Supp. 2001). A "consumer" is an individual "who seeks or acquires by purchase or lease, any goods or services." *Id.* § 17.45(4). Lopes' complaint includes

no allegations concerning goods or services that he purchased that form the basis of his claim; his claim is clearly based on State Farm's failure to settle a claim under an insurance policy that Miller, not Lopes, purchased. An insurance policy is a good or service to the insured, not to a third party seeking to recover on the policy. *Casteel*, 22 S.W.3d at 386.

Lopes responds by citing *Mendoza v. American Nat. Ins. Co.*, 932 S.W.2d 605 (Tex. App. — San Antonio 1996, no writ), "which established that suit was possible without the showing of consumer status if it could be shown that suit was based on certain violations of the DTPA that do not incorporate consumer standing as a requirement in the language of those subsections." Plaintiff's Response Brief at 3. This is an incorrect reading of *Mendoza*. "The DTPA protects consumers; therefore, consumer status is an essential element of a DTPA cause of action." *Mendoza*, 932 S.W.2d at 608. What *Mendoza* allowed to non-consumers was "an action under article 21.21 [§ 16] of the Insurance Code [which does not restrict standing to "consumers"] for a violation of section 17.46 of the DTPA." *Id.* Even then, "a plaintiff who is unable to show consumer status is limited to asserting violations of those subsections of section 17.46 that do not incorporate a consumer standing requirement in the language of the subsection." *Id.* Therefore, to survive the motion to dismiss, Lopes' complaint would have to: 1) plead facts which showed a violation of a subsection of § 17.46 which does not incorporate a consumer standing requirement; and 2) assert a cause of action for that violation under art. 21.21, § 16 of the Insurance Code.

That is not what the complaint does. The heading for paragraph 11 in the complaint is "Causes Of Action." Lopes clearly has asserted a cause of action under art. 21.21, § 4 of the Insurance Code. His second cause of action is identified as arising under the DTPA, not art. 21.21, § 16 of the Insurance Code. His response brief further supports this interpretation, by referring to

§ 17.50(b) of the DTPA, which is the DTPA cause of action. Even if the court construed his complaint as arising under art. 21.21, § 16 of the Insurance Code instead of directly under the DTPA, Lopes has not: 1) identified a specific subsection of § 17.46 of the DTPA, that does not incorporate a consumer standing requirement, as the basis for a cause of action under the Insurance Code; and 2) pleaded specific facts, rather than conclusory allegations, showing that State Farm violated that subsection of the DTPA. Accordingly, the court concludes that Lopes' second cause of action does not state a claim upon which relief can be granted.

Lopes also requests that, if the court determines that his complaint does not state a claim, he be allowed leave to amend his pleading. The court declines to grant leave at this time. Lopes' response brief identifies no facts which conceivably would demonstrate that he was a "consumer" and thus had standing for a DTPA cause of action. If he can legitimately allege facts supporting a DTPA cause of action or a claim under art. 21.21, § 16 of the Insurance Code, of course, Lopes may file a motion to reconsider. A claim under the latter, however, would require him to show that he is a

> person who has sustained actual damages *caused* by another's engaging in . . . any practice specifically enumerated in a subdivision of Section 17.46(b), Business & Commerce Code, as an unlawful deceptive trade practice . . . . To maintain an action for a deceptive act or practice enumerated in Section 17.46(b), Business & Commerce Code, a person must show that the person has *relied* on the act or practice to the person's detriment.

Tex. Ins. Code Ann. art. 21.21, § 16(a) (Vernon Supp. 2001) (emphasis added). It is not enough, for example, to allege that State Farm made misrepresentations; he would also have to show that those misrepresentations were the cause of his damages. The court further notes that he would be required to plead specific facts, not mere conclusory allegations, to avoid dismissal.

IV. Conclusion

For the above-stated reasons, the complaint fails to state a claim upon which relief can be granted. The court therefore **grants** Defendant's Motion to Dismiss, and this action is **dismissed with prejudice**. Defendant's Motion for Summary Judgment is **denied as moot**. Judgment will issue by separate document.

It is so ordered this 6th day of March, 2001.

Sam A. Lindsay
United States District Judge